83-2159

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

SONOMA VINEYARDS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in the context of determining whether a *prima facie* case of election misconduct has been made out so as to entitle the objecting party to a hearing, the court below applied the proper standard for agency in order to determine whether a labor union is legally responsible for coercive statements made by members.

2. Whether the court below applied an incorrect standard which effectively required a showing of agency before a hearing could be granted on alleged threats by union supporters of deportation of illegal aliens.

3. Whether the court below erred in requiring proof of actual effect on the voters of threats of deportation in order to grant the objecting party a hearing on its objections.

4. Whether the court below erred in discounting the Employer's *prima facie* case as unreliable hearsay rather than taking the allegations as true in order to determine whether a *prima facie* case had been made out.

5. Whether the court below erred as a matter of law in failing to grant a hearing on the Employer's objections in light of the *prima facie* case established by the Employer.

PARENT COMPANY AND SUBSIDIARIES

Sonoma Vineyards, Inc.

Atlantic Freight Sales, Inc.

All other subsidiaries of Sonoma Vineyards, Inc. are wholly-owned.

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Petitioner Sonoma Vineyards, Inc. ("Petitioner" or "Employer") petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit, reported at 727 F.2d 861 (9th Cir. 1984). This opinion, and subsequent judgment, granted enforcement of a decision and order of the National Labor Relations Board which, *inter alia*, directed that the Employer bargain with the Winery, Distillery & Allied Workers Union, Local 186, AFL-CIO ("Union") that had been certified by the NLRB as the exclusive representative of a unit of employees employed at Petitioner's Windsor, California facility. Specifically, Petitioner seeks a writ of certiorari

to review the portion of the court below's opinion which countenanced the Board's failure to grant the Employer a hearing on its objections to the election in spite of the existence of a *prima facie* case of threats of deportation of Spanish speaking employees employed in Petitioner's winery.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on March 6, 1984 is reproduced *infra* in Appendix A ("App." at pp. A1-13). The court subsequently denied Petitioner's petition for rehearing and suggestion for rehearing *en banc* by means of an order issued on May 3, 1984, which has not been reported. That order is reproduced *infra* (App. F, p. A57).

The opinion of the Court of Appeals for the Ninth Circuit granted enforcement of a decision and order of the NLRB, reported at 264 N.L.R.B. 642 (1982). It is reproduced *infra* (App. B, pp. A14-30).

In this decision and order, the Board, *inter alia*, directed that the Petitioner bargain with the Union and also reaffirmed its previous decisions denying the Petitioner a hearing on its objections to the election. *See* supplemental decision and certification of representative (App. C, pp. A31-A34); decision and order directing hearing (App. D, pp. A35-A37); and Regional Director's report (App. E, pp. A38-A56).

JURISDICTION

The opinion (App. A) of the court of appeals was filed on March 6, 1984. The Petitioner filed with that court a petition for rehearing and suggestion for rehearing *en banc*, which was denied by that court on May 3, 1984 (App. F). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2(13) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(13) provides:

> (13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), (5) provide:

> Section 8(a). It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to provisions of section 9(a).

STATEMENT OF THE CASE

Petitioner is a California corporation which, in relevant part herein, is a major producer and marketer of premium and super premium California wines, both through traditional channels of distribution and through direct marketing. The underlying case before the National Labor Relations Board arose pursuant to a petition filed by the Union on September 14, 1978, seeking an election among a unit of employees employed at Petitioner's Windsor, California operation.

Pursuant to a stipulation for certification upon consent election agreement, an election was conducted by the NLRB

on December 8, 1978. The corrected tally of ballots issued on Decembe 19, 1978 indicated that of approximately 173 eligible voters, 57 were cast for the Union, 40 were cast against the Union, and 54 votes, a determinative number, were subject to challenge. Nineteen timely objections to the conduct of the election and conduct affecting results of the election were filed by the Employer. The regional office of the NLRB conducted an investigation as to the eligibility of the voters and received evidence from the Employer in support of its objections.[1]

On or about March 13, 1979, the Regional Director issued her report on challenged ballots and objections recommending, on the basis of the Region's *ex parte* investigation, that all of the Employer's objections be overruled without granting an evidentiary hearing. Thereafter, on April 2, 1979, the Employer filed exceptions to the Regional Director's report on challenged ballots and objections, as well as a brief in support thereof, in which the Employer, *inter alia*, argued that the Region erred in denying the Employer a hearing on its objections, including the objections relating to threatened deportation, which are the subject of the instant petition. On July 11, 1979, a three-member panel of the Board issued a decision and order overruling the Employer's exceptions in their entirety, adopting *in toto* the recommendations of the Regional Director that no hearing be held on the Employer's objections and directing

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[1]The evidence supplied by the Employer in support of its objections is somewhat voluminous. However, the most significant evidence supplied by the Employer to the regional office of the NLRB, for the purposes of this petition for writ of certiorari, is the declaration of William Bagge, which is reproduced hereto in Appendix G.

that a hearing be held on some of the challenged ballots (App. D). A hearing was subsequently held on the challenged ballots only (which are not at issue herein); and on September 25, 1980, the hearing officer issued a report on challenged ballots, making a determination as to the eligibility of various voters, from which the Employer filed timely exceptions. On July 14, 1981, the Board issued its supplemental decision and certification (App. C) which denied the Employer's exceptions and certified the Union as the exclusive bargaining representative of the unit employees. On July 14, 1981, the Employer filed with the Board a motion for reconsideration, which was denied by the Board's order dated September 18, 1981.

Following the Board's certification of the Union, for the purpose of obtaining judicial review of the Board's certification, the Employer refused to bargain with the Union. Thereafter, on or about November 25, 1981, the Union filed an unfair labor practice charge alleging that the Employer had refused to bargain in good faith in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended. A complaint was issued by the Regional Director alleging such unlawful refusal to bargain on December 8, 1981. After various motions not relevant to the instant petition were filed and ruled upon, General Counsel filed with the Board a motion for summary judgment on or about February 9, 1982, and a memorandum in support thereof, which was opposed by the Employer.

On September 30, 1982, a three-member panel of the Board issued the decision and order, reported at 264 N.L.R.B. 642 (1982), which granted summary judgment against the Employer, confirmed its prior decisions in the

underlying representation case including, *inter alia*, the failure to grant the Employer a hearing on its objections and found that the Employer was in violation of Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Further, the Board ordered the Employer to bargain with the Union. Various motions for reconsideration were filed by the Employer and denied by the Board.

In order to obtain review of this decision and order, the Employer refused to bargain with the Union. Accordingly, on January 6, 1983, Elliot Moore, Deputy Associate General Counsel, brought this matter before the United States Court of Appeals for the Ninth Circuit by means of an application for enforcement of the Board's order. On March 6, 1984, that court issued an opinion enforcing the Board's order in all respects (App. A). Sonoma Vineyards filed a petition for rehearing and suggestion for rehearing *en banc* on March 20, 1984, which was denied by order of that court on May 3, 1984 (App. F).

The NLRB had subject matter jurisdiction in the underlying unfair labor practice proceeding pursuant to Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. § 160(b)). The United States Court of Appeals for the Ninth Circuit was empowered to consider the Board's application for enforcement of the underlying order by virtue of Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e)). The Board's application for enforcement was properly before the court in that the underlying Board order was a final order within the meaning of Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e)).

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

The errors claimed in this case on the part of the ninth circuit, while both general and specific, raise important legal issues requiring the supervision of this Court to assure national uniformity.

First, the opinion of the ninth circuit articulates the wrong standard for determining under what circumstances threats of deportation made in the critical pre-election period rise to the level of conduct sufficient to warrant an evidentiary hearing. By focusing on the issue of the Union's responsibility for such acts, rather than upon an analysis of the character and circumstances of the alleged objectionable conduct, the ninth circuit has diverged from the rules articulated by the first, third and fourt circuits and has created a virtual blueprint for interference with alien employees' freedom of free choice in this important issue.

Second, assuming, *arguendo,* the propriety of the ninth circuit's focus upon agency status of the alleged threatenor, the court applied the wrong standard for agency, a standard contrary to those of the District of Columbia, fifth and sixth circuits, by refusing to recognize the concept of ratification by failure to repudiate the acts of another. This is an erro with broad application permeating most aspects of vicarious liability in labor matters.

Third, the ninth circuit erred, in a manner inconsistent with the courts of appeals for the third, fourth and tenth circuits, by appearing to require that before an objecting party is entitled to a hearing on its objectives it must

submit proof that the alleged objectionable conduct had an actual effect on the vote. Such a standard, aside from being impossible to meet, conflicts with the decisions of the third, fourth and tenth circuits which utilize an objective test focusing on whether or not such objectionable conduct has the tendency to interfere with freedom of choice.

Finally, the ninth circuit erred, and this error is in conflict with the decisions of the second, third and fifth circuits, by discounting the Employer's evidence constituting its *prima facie* case, on the basis that it was hearsay. The courts cited above, and indeed the Board itself, have noted that in determining whether or not a *prima facie* case of objectionable conduct has been presented, it is incumbent upon the Board and the courts to assume the truth of the sworn declarations submitted, particularly when there is absolutely nothing in the record tending to cast doubt upon the truthfulness of the declarants' statements. It is simply impermissible, and a denial of due process, for the Board or the courts to make *ex parte* factual determinations. It is important for this Court to make it clear that such credibility resolutions have no place in resolution of the issue of the basic right of an objecting party to a hearing.

II

THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE FIRST, THIRD, AND FOURTH CIRCUITS BY GIVING INORDINATE WEIGHT TO THE UNION'S LEGAL RESPONSIBILITY FOR THREATS AND COERCIVE STATEMENTS MADE BY UNION SUPPORTERS

In the case below, the Employer was denied a hearing on its objections that an atmosphere of fear of deportation

existed among the employees. This objection was supported by the sworn and uncontradicted declaration of William Bagge (App. G) that the Employer employs Spanish-speaking employees of Mexican descent in its cellar department. This declaration showed that these Spanish-speaking cellar employees had heard and were greatly upset by a report that a vocal Union adherent had called the Border Patrol in hopes of having these cellar employees removed before the election and that the idea of calling the Border Patrol to prevent them from voting originated at a Union organizing meeting. This greatly upset these employees.

Of course, in analyzing the propriety of this denial of a hearing, the court was required to examine the record to determine whether the Employer's objections, and evidence supplied therewith, made out a *prima facie* case by raising substantial and material legal issues. *NLRB v. Masonic Homes of California, Inc.*, 624 F.2d 88, 89 (9th Cir. 1980). In analyzing the existence of this *prima facie* case, the ninth circuit ascribed great weight to the issue of the Union's legal responsibility for this deportation threat (App. A, p. A9). Once having found that the threats were not attributable to the Union, the court set an almost impossible standard for the establishment of a *prima facie* case, the subjective standard that employees' votes were actually affected by the rumor. Thus, it is apparent that the court below ascribed great weight to the agency issue and in so doing is in conflict with the decisions of the first, third, and fourth circuits, which ascribe little or no weight to the agency issue when the objectionable conduct involves employee threats.

ARA Services, Inc. v. NLRB, 712 F.2d 936 (4th Cir. 1983) is indicative of the rule established in these other

circuits. As in the instant case, the alleged objectionable conduct involved a threat directed against three employees by their co-workers that they would be reported as illegal aliens to immigration authorities. The Board certified the union without a hearing over the employer's objections, relying heavily on the fact that there was no evidence attributing this misconduct to the union. The fourth circuit rejected this analysis. Accepting the Board's view that there was no evidence tying this threat to the union, the fourth circuit determined that a hearing was required nonetheless because of the inherently coercive nature of the threat:

> We disagree with the Regional Director's conclusion that the threats did not create an atmosphere in which free choice was impossible. Indeed, we fail to see how such remarks could not have done so.

712 F.2d at 937.

Similarly, the Third Circuit Court of Appeals in the case of *Zeiglers Refuse Collectors, Inc. v. NLRB,* 639 F.2d 1000 (3d Cir. 1981) declined the Board's invitation to give pivotal or even significant weight to the fact that there had been no showing that the union was responsible for threats of physical violence made by employee union supporters:

> The Board asserts that its determination that the union did not participate in the threats must be given great weight because workers are less likely to be intimidated by threats that do not bear the imprimatur of the union, and that ordering a new election would not deter improper conduct of third parties . . .

> Here, the fact that Pee Wee Preston was not a union agent does not make his threats of physical violence any less intimidating.

639 F.2d at 1006-07.

In the instant case, the issue of union responsibility is no less significant in determining whether a *prima facie* case of objectionable conduct was raised. As the courts of appeals for the third and fourth circuits have recognized, whether or not the threatenor is a union agent has no impact on the likely effect of his threats; agency is not required in order to place a telephone call to the Immigration and Naturalization Service. Indeed, a voter may well be more intimidated by threats by a fellow employee especially given the ease at which such threats could be carried out.

The Court's attention is also called to the case of *Cross Baking Co. v. NLRB,* 453 F.2d 1346 (1st Cir. 1971), which involved the Board's certification of the union without a hearing on the employer's objections. One of these objections dealt with an assault on a pro-employer employee by a pro-union employee. The court expressly rejected the Board's argument that the incident should be discounted because of a lack of showing of union culpability as follows:

> It does not follow that fear would be any less effective if it had an unofficial origin. Indeed, we can visualize situations where it might be more effective. If union official instigated violence, anti-union employees might gain adherents to get rid, once and for all, of a belligerent union by voting against it, whereas if the atmosphere was the product of co-employees, the rest of the employees might feel they were going to be left with a disagreeable situation whatever should happen in the election, and hence had best learn to live with it.

453 F.2d at 1348.

By failing to take into account that the effectiveness of a threat of deportation would be little influenced by the official or unofficial status of the threatenor, the ninth circuit gave undue weight to the agency issue, contrary to the decisions of the first, third and fourth circuits cited above.

III

IN FINDING THAT THERE WAS NO PRIMA FACIE CASE THAT DEPORTATION THREATS WERE ATTRIBUTABLE TO THE UNION, THE NINTH CIRCUIT APPLIED A STANDARD FOR AGENCY WHICH IS IN CONFLICT WITH THE DISTRICT OF COLUMBIA, FIFTH AND SIXTH CIRCUITS BY FAILING TO RECOGNIZE THE CONCEPT OF RATIFICATION BY THE UNION'S FAILURE TO REPUDIATE

Putting to one side for the moment the ninth circuit's undue reliance on the status of the deportation threatenor as an agent of the Union, the court applied the wrong standard of law in determining agency status and in so doing is in conflict with numerous decisions of various other courts of appeal.

The standard for agency under the Act is set out in Section 2(13) thereof (29 U.S.C. § 152(13)) which states:

> In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board and courts have uniformly held that this statute requires that common law rules of agency are to govern the question of who acted for whom for the purposes of deter-

mining culpability under the Act, e.g., *NLRB v. Local 90, Operative Plasterers and Cement Masons' Int'l Ass'n,* 606 F.2d 189, 192 (7th Cir. 1979), *enforcing,* 236 N.L.R.B. 329 1978); *Laborers & Hod Carriers Local No. 341 v. NLRB,* 564 F.2d 834 (9th Cir. 1977) *enforcing,* 223 N.L.R.B. 917 (1976). Furthermore, it is black letter law that vicarious liability may flow from a principal's failure to repudiate the acts of a putative agent. *Restatement Agency* 2d, §§ 82, 94.[2] The comments by the *Restatement* reporters are particularly illuminating on this subject:

> Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred. Such inference may be made although the purported principal had no knowledge that the other party would rely upon the supposed authority of the agent; his knowledge of such fact, however, coupled with his silence, would ordinarily justify an inference of assent by him. Whether or not such inference is to be drawn is a question for the jury, unless the case is so clear that reasonable men could not come but to one conclusion.

This principle of law, that vicarious liability may be established by a failure to repudiate actions under circumstances in which such repudiation could reasonably be expected, has been articulated by many courts of appeal

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[2]Section 82 provides:

> Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Section 94 provides:

> An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.

For example, *Amalgamated Clothing Workers of America v. NLRB,* 371 F.2d 740, 744 (D.C. Cir. 1966), in which a company's failure to disavow anti-union activity of community leaders resulted in a holding of vicarious liability for their actions; *Black Diamond Coal Mining Co. v. Local Union No. 8460 UMWA,* 597 F.2d 494, 495 (5th Cir. 1979), in which the court recognized potential union liability for coercive acts of members which the union ratified by inaction; *NLRB v. Dayton Motels, Inc.,* 474 F.2d 328, 331 (6th Cir. 1973), in which the court recognized that management could be held vicariously liable for coercive acts of employees by acquiescence; *Shimman v. Frank,* 625 F.2d 80, 97 n.32 (6th Cir. 1980), *rehearing denied,* 633 F.2d 468 (6th Cir. 1980), in which the court recognized inaction by the union may support an inference of authorization of violent acts of the members.

In the instant case, the Employer's *prima facie* case showed that the plan of calling the Border Patrol to rid themselves of pro-Employer cellar employees was propounded by a vocal Union suporter at a Union organizational meeting. The failure on the part of the Union to repudiate this action could reasonably be viewed by employees as implicit ratification of this unlawful plan. The ninth circuit's failure below to recognize the doctrine of implied ratification is contrary to established law and requires the supervision of this Court so that this basic legal principle may receive uniform treatment.

IV

BY REQUIRING EVIDENCE THAT THE THREAT OF DEPORTATION ACTUALLY COERCED VOTERS, THE OPINION OF THE NINTH CIRCUIT CONFLICTS WITH THE RULE IN THE CIRCUITS WHICH UTILIZE AN OBJECTIVE TEST IN DETERMINING WHETHER COERCIVE ACTS WARRANT A HEARING

Once determining that the Union was not legally responsible for the deportation threats (*see* Sections II and III, *supra*), and that the case therefore involved third party misconduct, the court in this case articulated an extremely high standard for entitlement to a hearing in such cases. Thus, the court required that before a party is entitled to a hearing, it must present a *prima facie* case that employees' votes were actually affected by the threats (App. A, p. A10). Aside from being an unrealistic standard and almost an impossible burden, this requirement of evidence of subjective state of mind conflicts with the standard in other circuits where an objective test is the rule.

For instance, in *Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d at 1005, the third circuit articulated standard as follows:

> The Board and the courts have emphasized that the existence of a coercive atmosphere, regardless of how such an atmosphere came about, is the critical fact upon which the Board should focus in determining whether a fair and free election was possible. [Citation] Thus, if it is determined that a *substantial possibility* existed that the threats affected the outcome of the election, a new election must be held. [Emphasis added].

Similarly, in *Worley Mills, Inc. v. NLRB*, 685 F.2d 362 (10th Cir. 1982), the court articulated the following objective standard for determining when misconduct rises to the level necessary to invalidate an election:

> Interference with the employees' exercise of free choice must be present in the record to such an extent that an inference can be drawn that the conduct materially affected the election results . . .

685 F.2d at 386. The fourth circuit also utilizes an objective test. Summarizing its view of the law, that court held:

> The Board's test for whether an atmosphere of fear and coercion exists is whether:
>
> > . . . the election was held in a general atmosphere of confusion, violence and threats of violence such as might reasonably be expected to generate anxiety and fear of reprisal, to render impossible a rational uncoerced expression of choice as to bargaining representation. . . .

Electronic Components Corp. of N.C. v. NLRB, 546 F.2d 1088, 1092 (4th Cir. 1976).

Of course, while evidence that the acts had the actual effect of coercing the voters would be relevant in assessing the pre-election atmosphere, neither the third, fourth or tenth circuits *require* such evidence as did the court below. By focusing on the state of mind of the voters, the ninth circuit set far too high a standard of proof in election cases, a standard which will make proof of election misconduct extremely difficult. Moreover, this improper standard for election interference has the resulting effect of insulating wrongdoers from the scrutiny of an evidentiary hearing. If it is difficult to prove election interference under such a standard, it is doubly hard to obtain a hearing, as one's

prima facie case necessarily is established through voluntary cooperation from people who may not (without subpoena) reveal evidence of actual impact on their votes.

The rule in the ninth circuit can have no other effect than to lessen the high standards traditionally demanded of NLRB elections. Since the ninth circuit rule conflicts with the more correct rules of the third, fourth and tenth circuits, this Court must intervene to assure uniformity.

V

THE RULE OF THE NINTH CIRCUIT, WHICH ALLOWS THE BOARD TO DISREGARD OR DISCOUNT HEARSAY DECLARATIONS IN DETERMINING WHETHER AN OBJECTING PARTY IS ENTITLED TO A HEARING, IS IN CONFLICT WITH THE RULES OF THE SECOND, THIRD AND FIFTH CIRCUITS

There is no dispute that in this case the Employer's *prima facie* case concerning the threat of deportation issue was comprised of a hearsay declaration by a cellar supervisor, Bagge. Citing *NLRB v. Hepa Corp.*, 597 F.2d 166 (9th Cir. 1979), *cert. denied*, 444 U.S. 926 (1979), the court below appeared to countenance the Board's disregard, or at least discounting, of the employer's *prima facie* case because of its hearsay nature (App. A, p. A9). This is consistent with the ninth circuit's prior cases on this subject. For instance, in *NLRB v. Hepa Corp.*, *id.*, the ninth circuit stated:

> Hepa, nevertheless, contends that misconduct attributable to these individuals invalidated the election. It points to the testimony of an employee who said that a second employee had overheard a third employee tell

> a fourth employee that two other employees would be hurt for opposing the union. The Board properly rejected this hearsay.

597 F.2d at 167.

The other circuits that have addressed this issue do not require such a high standard for the establishment of a *prima facie* case and have recognized that such a standard would be almost impossible to meet. For instance, in *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981), the issue before that court involved the propriety of the Board's decision to overrule the company's objections without an evidentiary hearing. This decision by the Board was based, at least in part, upon the company's failure to produce non-hearsay statements on the subject. The court rejected the requirement of non-hearsay testimony as follows:

> By taking this position, the Board placed far too high a burden on an employer who seeks a hearing to prove that improper inducements were offered by a union. Firsthand testimony establishing that the Union intended improper conduct could come only from Darling or Union officials. But it was impossible for the company to obtain their testimony because without a hearing an employer must rely on the voluntary cooperation of witnesses to develop a case . . .

649 F.2d at 913.

Similarly, in *EDS-IDAB, Inc. v. NLRB*, 666 F.2d 971 (5th Cir. 1982), a case in which the propriety of the Board's overruling of an employer's objections without a hearing was in issue, the Board argued that it properly discounted much of the employer's *prima facie* case because of its

hearsay nature. The court squarely rejected this contention as follows:

> The Company was required to, and did, file an objection to the election within five days after the tally of the ballots. The objection properly contained only a short statement of the conduct which allegedly affected the outcome of the election, which was supported by affidavits. The hearsay at issue here appears in the affidavits submitted by the Company. A party objecting to an election, whether that party be the Company or the Union, must rely upon the *voluntary* cooperation of witnesses at this stage of the proceedings [citation]. It is apparent that such voluntary cooperation will often be difficult or impossible to obtain. . . .
>
> For the foregoing reasons, we conclude that the Regional Director, in considering whether the Company has made a sufficient showing to be entitled to a hearing, was not authorized to refuse to consider the Company's affidavits solely on the basis of the hearsay nature.

666 F.2d at 975 (emphasis in original; footnote omitted).

The third circuit rejected a similar Board contention in *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292 (3d Cir. 1981) as follows:

> The Board may properly insist on competent evidence at an evidentiary hearing, when its subpoena powers are placed at the parties' disposal [citation]. However, when material factual issues are raised in an affidavit alleging specific instances of unlawful conduct by a party to an election, the allegations giving rise to those issues may not be disregarded, simply because of their hearsay nature . . .

644 F.2d at 298.

By placing undue emphasis upon the hearsay nature of the Employer's *prima facie* case here, the ninth circuit has placed far too heavy and indeed oftentimes an impossible burden on an objecting party. The second, third and fifth circuits have properly recognized that the objecting party's sole burden is to raise substantial and material factual issues; that resolution of these factual issues, or discounting of sworn statements without a hearing, is inappropriate. The contrary position of the ninth circuit articulated in this case and in *NLRB v. Hepa Corp.*, 597 F.2d at 166, which is in conflict with the other circuits, cannot stand. This Court must intervene in order to ensure uniformity among the circuits in this important area of law.

VI

CONCLUSION

For the the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: June 29, 1984.

Respectfully submitted,

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Appendix A

National Labor Relations Board,
Petitioner,

v.

Sonoma Vineyards, Inc.,
Respondent

No. 83-7025

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Dec. 13, 1983
Decided March 6, 1984

Before WALLACE, BOOCHEVER, Circuit Judges, and WYZANSKI, Senior District Judge.*

BOOCHEVER, Circuit Judge.

The National Labor Relations Board (the Board) seeks enforcement of an order to bargain in good faith. The Board found Sonoma Vineyards, Inc., (Sonoma or the Company) in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(1) and (5) (1976), because Sonoma refused to bargain with Distillery Workers Union, Local No. 186, AFL-CIO (the Union). The Board certified the Union as the employee bargaining representative after a representation election. Sonoma contends that the certification election was invalid because of conduct by the Union and the Board's election agent, and because the ballots of twenty-one mail order processing employees improperly were excluded from the tally.

*Honorable Charles E. Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

We find Sonoma's objections to the conduct of the Union and the Board's agent are without merit. Sonoma has failed to preserve its demand for a hearing on exclusion of the mail order employees. We enforce the Board's order.

FACTS

A. The Representation Proceeding

On September 14, 1978, the Union filed a petition for a representation election to be conducted at Sonoma's facilities in Windsor, California. Subsequently, the Union and the Company executed a stipulation as to which employees would be eligible to vote. The stipulated bargaining unit included "mail order processing employees," but excluded "office clerical employees."

Fifty-seven employees voted for the Union, forty against, and fifty-four ballots were challenged. Among the ballots challenged by the Union were those of twenty-one mail order processing clerks, whose job duties included clerical functions. The Company objected to the exclusion of these ballots on grounds that the stipulation required inclusion of the employees in the unit. Sonoma also filed other objections to the conduct of the election.

The Board's Regional Director recommended that Sonoma's objections to the conduct of the election be overruled without an evidentiary hearing. The Regional Director found the stipulation ambiguous with regard to the twenty-one mail order processing clerks, and ordered that their eligibility be resolved after an evidentiary hearing to determine whether the clerk's had a "community of interest" with other unit employees. The Board adopted the recommendations and ordered a hearing before an

Administrative Law Judge (ALJ). Subsequently, the ALJ found that the mail order processing employees lacked sufficient community of interest with the other unit employees, and he sustained the challenge to the ballots. The Board adopted the ALJ's report and certified the Union as the collective bargaining representative.[1]

B. The Unfair Labor Practice Proceeding

Sonoma concedes that it refused to bargain with the Union after certification. In opposition to the unfair labor practice charges, Sonoma repeated its earlier arguments opposing Union certification. Sonoma also presented to the Board what it termed "newly discovered evidence" of bias involving the Board agent who conducted the election. Sonoma alleged that the agent obtained employment with the Union three years after the election.

The Board granted summary judgment against Sonoma. It found that the certification issues were or could have been litigated in the prior representation proceeding, and the alleged "newly discovered evidence" of bias did not warrant decertification. The Board ordered the Company to bargain with the Union.

On appeal, Sonoma argues that the Board improperly certified the Union as the bargaining representative without a hearing on Sonoma's objections. Sonoma repeats its

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[1]The Union's attorney sent a letter to the Regional Director stating that he believed the Union's challenges to the stipulation were meritorious. This letter was not served on the Company. Upon discovering that the letter had been filed, the Company filed a brief prior to the hearing officer's report rebutting the Union attorney's statement. The Board found that the letter did not prejudice the Company.

earlier allegations that the Board agent exhibited bias, that the Union initiated rumors that immigration authorities would be called to arrest illegal alien employees, and that one employee improperly was disenfranchised by the Board agent. Sonoma also contends the unit stipulation unambiguously required inclusion in the unit of the twenty-one mail order employees. Sonoma argues that even if the stipulation was ambiguous, the Board should have held a hearing to establish the intent of the parties prior to deciding whether the disputed employees shared a community of interest with other unit members.

DISCUSSION

I. Standard of Review

The Board's conclusions and findings of fact must be affirmed if supported by substantial evidence on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 485-487, 71 S.Ct. 456, 463-64, 95 L.Ed. 456 (1951); *NLRB v. Vista Hill Foundation,* 639 F.2d 479, 483 (9th Cir. 1980).

The Board has broad discretion in conducting and supervising representation elections. *Summa Corp. v. NLRB,* 625 F.2d 293, 295 (9th Cir.1980); *Coronet-Western v. NLRB,* 518 F.2d 31, 32 (9th Cir.1975) (per curiam). "The Board is required to grant an evidentiary hearing only where substantial and material factual issues are raised, and the party objecting to the election must supply the Board with evidence establishing a prima facie case for disturbing the results." *St. Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436, 1444-45 (9th Cir.1983). We will overturn the Board's certification of a union without a hearing on objections only if the Board has abused its dis-

cretion. *Spring City Knitting Co. v. NLRB,* 647 F.2d 1011, 1017 (9th Cir.1981). Hearing is unnecessary where, if all the facts contended by the objecting party were credited, no ground is shown which would warrant setting aside the election. *NLRB v. Harrah's Club,* 403 F.2d 865, 869 (9th Cir.1968).

II. Analysis

A. Bias of the Board Agent

The Company argues that three incidents demonstrated a prima facie case of bias of the Board's agent, Lee Corbett, requiring an evidentiary hearing. We find none of the incidents persuasive of bias.

In the first incident, a Union observer asked agent Corbett what would happen to the ballots that had been challenged. Corbett replied that the Union could prove the challenges individually or by groups, and that he thought it would be very easy for the Union to prove its challenges. The Company's observer stated that employees came up to vote "between" the comments.

It is unlikely that this allegedly offending conduct interfered with or inhibited the free choice of the employees in selecting their bargaining representative, or with the employee's actions at the polls. *See Valley Rock Products, Inc. v. NLRB,* 590 F.2d 300, 302 (9th Cir.1979) (per curiam). There is no indication that the statements were heard by any employee other than the Company's observer. Other circuits have found similar comments harmless. *See NLRB v. Allen's IGA Foodliner,* 652 F.2d 594, 595-96 (6th Cir.1980) (Board agent's comment that "if the employees had been treated right she would not be there holding the

election"); *NLRB v. Computer Science Corp.*, 589 F.2d 232, 235 (5th Cir.1979) (per curiam) (Board agent's comment that the Company's challenges were frivolous did not demonstrate partiality). We affirm the Board's rejection of this objection.

We also find no indication that the Board agent's method of informing employees that their ballots were challenged was biased. Initially, the Board agent told voters that the Union had challenged their votes. Challenged voters repeatedly became indignant or upset when so informed, and the Union expressed concern over the voters' reactions. Consequently, throughout the afternoon voting session the Board agent simply informed employees that their votes were being challenged without identifying the Union as the challenger. It is unclear precisely how the agent's procedure evidenced bias, and Sonoma cites no authority supporting its objection. It seems unlikely the agent's procedures affected the outcome of the election. The Board did not abuse its discretion in overruling this objection without a hearing.

The Company also alleges that the Board agent violated 29 C.F.R. § 102.119[2] by obtaining employment with the Union as a business representative subsequent to the election. The election was held on December 8, 1978. The Board's agent began working for the Union three years

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[2]29 C.F.R. § 102.119 (1983) provides:

> No person who has been an employee of the Board and attached to any of its regional offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any regional office to which he was attached during the time of his employment with the Board.

later, in 1981. We agree with the Board that the agent's employment three years after the election did not affect the impartiality of the election. Nor did the former Board agent represent the Union before the Board in this case in violation of 29 C.F.R. § 102.119.

B. Disenfranchisement of a Voter

The Company alleges that the Board agent improperly forced employee Frank Carillo to wait before voting, causing Carillo to become upset and not vote. There was a dispute between a Union observer and another employee over Carillo's eligibility to vote. The Board agent asked the observer if the Union intended to challenge Carillo. The Union observer replied that he was uncertain and wished to wait until another Union observer returned. The Board agent asked Carillo to stand aside. After waiting more than ten minutes, Carillo left voluntarily without voting or telling the Board agent he was leaving. He did not return, although the polls were open a second time during his shift.

Our research has not disclosed a case with precisely the facts at issue here. A number of analogous situations, however, suggest that it may be within the discretion of a Board agent to impose reasonable delays on voters in order to ascertain their eligibility. The Board's Case Handling Manual, for example, expressly permits election agents to ask challenged voters to remain at the polling place awaiting a slack period to cast their ballots. The Board also encourages its agents to avoid unnecessary election delays because of groundless challenges. *Fulton Bag & Products Co.*, 121 N.L.R.B. 268, 270 n. 5 (1958). On similar facts, the Fifth Circuit declined to set aside an

election. *NLRB v. W.R. Grace & Co.*, 571 F.2d 279, 282 (5th Cir.1978) (employee left when Board agent questioned his eligibility). An occasional inconvenience may be required of employees in order to vote. The Ninth Circuit has refused to set aside elections where employees voluntarily failed to vote, even though voting would have caused the employees personal hardships. *See Beck Corp. v. NLRB*, 590 F.2d 290, 293 (9th Cir.1978) (per curiam) (election held during employees' scheduled day off); *ITT v. NLRB*, 294 F.2d 393, 394-95 (9th Cir.1961) (possible loss of employees' daytime jobs). In the instant case, there was no indication that the Union observers used this technique as a delaying tactic to discourage certain voters. Nor was it apparent that the minor delay caused Carillo not to return to the poll later in the day. We find that the Board did not abuse its discretion by overruling this objection without an evidentiary hearing.

C. Alleged Threats of Deportation

The Company submitted to the Board a declaration by a supervisor that several unnamed employees told him that another unnamed employee claimed that yet another employee, allegedly a Union supporter, had suggested at a Union meeting that the Border Patrol be called, presumably to discover and eliminate any illegal aliens in the work force before the election.[3] The declaration alleged that several employees of Mexican descent "were very upset by these rumors." Sonoma submitted no evidence of the number of employees allegedly exposed to and upset by the

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[3]The employees allegedly would not allow use of their names for fear of deportation. Presumably, they would have the same fear of coming forward if an evidentiary hearing were held.

rumor, or that the Border Patrol actually was called. Nor did Sonoma show any employee was deterred from voting or voted against his choice.

Apart from the unreliability of the supervisor's hearsay declaration, *see NLRB v. Hepa,* 597 F.2d 166, 167 (9th Cir.1979) (per curiam), we find little indication that the deportation threat could be attributed to the Union. Sonoma made no prima facie showing that the Union approved of the threat. At most, Sonoma alleges an isolated statement by an unidentified person at an open Union meeting. The Union could not control every statement made at an open meeting. *See May Department Stores Co. v. NLRB,* 707 F.2d 430, 433 (9th Cir.1983). *Cf. Bush Hog, Inc. v. NLRB,* 420 F.2d 1266, 1269 (5th Cir.1969) (court should not invite third parties to create incidents that could invalidate an election). We find unpersuasive Sonoma's contention that a party may become a union agent merely by speaking at such a meeting.

Incidents which are not attributable to a union are entitled to less weight than union-attributable statements in determining whether a free election was possible, *NLRB v. Spring Road Corp.,* 577 F.2d 586, 588 (9th Cir.1978); *NLRB v. Aaron Bros. Corp.,* 563 F.2d 409, 412 (9th Cir.1977) (per curiam), because "there generally is less likelihood that they affected the outcome." *NLRB v. Mike Yurosek & Sons, Inc.,* 597 F.2d 661, 663 (9th Cir.), *cert. denied,* 444 U.S. 839, 100 S.Ct. 78, 62 L.Ed.2d 51 (1979).

On several occasions this court has addressed allegations that deportation threats by union adherents created an atmosphere of coercion sufficient to invalidate an election.

See, e.g., NLRB v. Eskimo Radiator Mfg. Co., 688 F.2d 1315, 1319 (9th Cir.1982) (per curiam); *Mike Yurosek & Sons*, 597 F.2d at 662-63; *NLRB v. Heath Tec Division/San Francisco*, 566 F.2d 1367, 1372 (9th Cir.), *cert. denied*, 439 U.S. 832, 99 S.Ct. 110, 58 L.Ed.2d 127 (1978). We have noted that "[d]eportation rumors which are not attributable to the union do not automatically result in overturning the election." *Eskimo Radiator*, 688 F.2d at 1319. In *Eskimo Radiator* the court upheld the Board's denial of such an objection without an evidentiary hearing. As in the instant case, the employer in *Eskimo Radiator* offered no prima facie evidence that any employee's vote was affected by the rumor. *Id.*

Because the deportation rumors were not attributable to the Union, and the employer presented no prima facie evidence that any employee was coerced, no evidentiary hearing was required.

D. The Unit Stipulation

Sonoma contends that the unit stipulation was unambiguous and clearly compelled inclusion of the disputed mail order employees in the bargaining unit. Alternatively, Sonoma argues that even if the stipulation was ambiguous on its face, the Board should have held a hearing to determine the intent of the parties before deciding the eligibility of the employees based on traditional Board principles.

When a union and an employer enter into a stipulation of this sort, the Board is bound by the stipulation's terms unless the stipulation violates applicable statutes or settled Board policy. *NLRB v. Mercy Hospitals of Sacramento, Inc.*, 589 F.2d 968, 972 (9th Cir.1978), *cert. denied*,

440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 458 (1979); *NLRB v. Detective Intelligence Service, Inc.*, 448 F.2d 1022 (9th Cir.1971). No one contends that the stipulation at issue violated Board policy or the law. Instead, the Board found the stipulation was ambiguous, and therefore was not determinative of the eligibility of the disputed employees.

The ambiguity arose because the stipulation included within the unit "mail order processing employees," but excluded "office clerical employees."[4] Although these terms appear clear on their face, they become less clear when the job duties of the disputed employees are considered. The employees were termed "mail order processing employees." Their job station, however, was separated from other mail order processing employees, and, unlike other mail order employees, their duties included significant amounts of clerical tasks. The stipulation did not state how employees with such mixed duties were to be classified. We find substantial evidence supports the Board's conclusion that the stipulation was ambiguous with regard to the disputed employees.

Assuming the stipulation was ambiguous, "[T]he primary question . . . is what the parties meant." *NLRB v. Joclin Mfg. Co.*, 314 F.2d 627, 633-34 (2d Cir.1963). Sonoma

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[4] The bargaining unit stipulation read in its entirety:

12. THE APPROPRIATE COLLECTIVE—BARGAINING UNIT.—

All production and maintenance employees of the Employer at its Windsor, CA facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; and excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

contends the Board erred by failing to hold a hearing to determine the intent of the parties applying its "community of interest" test.

Throughout the proceedings before the Board, however, Sonoma contended that no hearing was necessary, because the stipulation was unambiguous. At no time did Sonoma request a hearing to introduce parol evidence of an understanding by the parties outside of the written agreement; Sonoma's unwavering position was that no evidence of external agreements was necessary or relevant.[5]

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[5]Sonoma's counsel at oral argument referred to its objections to the findings of the Regional Director as an indication that Sonoma had raised issue of intent before the Board. Sonoma's Objection No. 69 reads:

> To the Regional Director's finding that "it is not possible to establish with clarity the intent of the parties in describing the appropriate unit."

Sonoma's Objection, however, does not demand a hearing on intent. It merely repeats Sonoma's contention that the parties' intent was clear from the face of the document.

We find more revealing Sonoma's Objection Nos. 66 and 68, which read:

> To the Regional Director's suggestion that any oral agreement asserted by Petitioner at this time is relevant to proper determination of challenged ballots when controlling precedent makes clear that an alleged oral agreement may not be relied upon to controvert the clear terms of a written stipulation as to voter eligibility.
>
> To the Regional Director's inclusion of Petitioner's contention in this report since controlling precedent makes clear that any alleged oral misunderstanding is completely irrelevant to the proper disposition of challenged ballots where voter eligibility is made clear by a written stipulation.

It appears to have been Sonoma's position that evidence of agreements external to the stipulation was "completely irrelevant."

In the absence of extraordinary circumstances, no objection may be raised on appeal if it has not been urged before the Board. 29 U.S.C. § 160(e). *See NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 796 (9th Cir.1981). We find no extraordinary circumstances justifying Sonoma's failure to request a hearing on intent. Consequently, we find Sonoma has failed to preserve its objection to the Board's failure to hold such a hearing.

CONCLUSION

We find the Board's rejection of Sonoma's objections to the certification election without an evidentiary hearing was not an abuse of discretion. The Board's finding that the stipulation was ambiguous with regard to the disputed mail order employees is supported by substantial evidence. Sonoma has failed to preserve its objection to the Board's failure to hold a hearing to determine the intent of the parties. The Board's order is enforced.

ORDER ENFORCED.

Appendix B

264 NLRB No. 85

Case 20—CA—16759

United States of America
Before the National Labor Relations Board

Sonoma Vineyards, Inc.,
Employer,

and

Winery, Distillery and Allied Workers Union,
Local No. 186, AFL-CIO,
Petitioner.

DECISION AND ORDER

Upon a charge filed on November 25, 1981, by Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO, herein called the Union, and duly served on Sonoma Vineyards, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 20, issued a complaint on December 8, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 14, 1981, following a Board election in Case 20—RC—14690, the Union was

duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 18, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 21, 1981, Respondent filed with the General Counsel alternative motions that (1) the time to answer the complaint be indefinitely extended, and (2) the complaint be withdrawn.[2] On the same date, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and alleging as an affirmative defense that the Board's certification of the Union is invalid.

On February 11, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment.[3] Subsequently, on February 18, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted.

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[1]Official notice is taken of the record in the representation proceeding, Case 20—RC—14690, as the TCCM "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2]On January 6, 1982, the General Counsel, by the Acting Regional Director, denied the motions.

[3]On this date, counsel for the General Counsel also filed with the Board a memorandum in support of the motion.

Respondent thereafter filed two responses to the Notice To Show Cause, entitled (1) "Cross-Motion for Withdrawal of Order Transferring Proceeding to Board and Notice to Show Cause" and (2) "Response to Motion for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain but, *inter alia,* it attacks the Union's certification on the basis that the Board erred in certifying the Union as the exclusive bargaining representative of Respondent's employees in the appropriate unit. In his Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case and that there are no factual issues warranting a hearing.

A review of the record, including that in Case 20—RC—14690, discloses, *inter alia,* that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted among the employees in the stipulated unit on December 8, 1978, and that the tally of ballots furnished the parties after the election showed 57 votes cast for and 40 against the Union. There were 54 challenged ballots which were sufficient in number to affect the results of the election. Respondent filed timely objections alleging, *inter*

alia, that the Union threatened employees, made promises of benefits to employees, improperly offered to waive initiation fees, and made material misrepresentations. It further alleges that the Board agent interfered with the fair operation of the election process by, *inter alia,* demonstrating bias and prejudice against Respondent prior to and during the election. After investigation, the Regional Director on March 13, 1979, issued her Report on Challenged Ballots and Objections in which she recommended that the objections be overruled, that the challenge to 1 voter's ballot be overruled, and that a hearing be held to resolve the eligibility of the remaining 53 challenged voters.

On April 2, 1979, Respondent filed exceptions to the Regional Director's report in which it essentially reiterated the allegations and contentions set forth in its objections. Respondent also excepted to the Regional Director's recommendation that a hearing be held to resolve certain challenges. On July 11, 1979, the Board issued a Decision and Order Directing Hearing[4] in which it adopted the findings and recommendations set forth in the Regional Director's report.

Pursuant to the Board's order directing hearing, a hearing was held on September 18, September 26-28, October 1-5, and October 10, 1979. On September 25, 1980, the Hearing Officer's report on challenges issued recommending that 47 of the 53 challenges be sustained and that the remaining challenges be overruled and those ballots be opened and counted. On October 14, 1980, Respondent filed exceptions to the Hearing Officer's report, alleging, *inter alia,* that the Hearing Officer erroneously sustained the challenges to

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[4]Not reported in bound volumes of Board Decisions.

the ballots of a number of employees whose inclusion was required by the language of the stipulation concerning the appropriate bargaining unit. On July 14, 1981, the Board issued a Supplemental Decision and Certification of Representative[5] adopting the Hearing Officer's report and certifying the Union as the collective-bargaining representative of the employees in the appropriate unit. In its Decision, the Board found that an *ex parte* communication which occurred prior to the issuance of the Hearing Officer's report did not prejudice Respondent.

On July 24, 1981, Respondent filed a motion for reconsideration of the Board's Supplemental Decision and Certification, alleging, *inter alia,* that the Board committed grievous error by finding that the *ex parte* communication was harmless. On September 18, 1981, the Board issued an order denying motion in which it found Respondent's motion lacked merit and contained no issue not previously considered by the Board.

By letters dated September 3 and September 22, 1981, the Union requested that Respondent meet with it for the purpose of negotiating a collective-bargaining agreement. By letters dated September 18 and September 29, 1981, Respondent refused to recognize and bargain with the Union.

After issuance of the complaint in this proceeding, Respondent filed a "Motion to Extend Indefinitely Time to Answer Complaint and Motion to Withdraw Complaint," alleging that the Board's certification of the Union is invalid because of newly discovered evidence showing the

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[5]Not reported in bound volumes of Board Decisions.

bias of the Board agent who conducted the election. Thus, Respondent submitted evidence that said Board agent accepted employment with the Union as a business representative responsible for representing the Union in its ongoing efforts to secure recognition from Respondent. Respondent argues that this is in direct contravention of Section 102.119 of the Board's Rules and Regulations, Series 8, as amended, prohibiting practice before the Board of its former employees in cases pending during employment with the Board. It further argues that the Board agent's current employment supports Respondent's earlier contentions that the Board agent was biased. The Acting Regional Director denied this motion without comment.

On March 3, 1982, Respondent filed a "Cross-Motion for Withdrawal of Order Transferring Proceeding to the Board and Notice To Show Cause," reiterating the arguments it made in its "Motion to Extend Indefinitely Time to Answer Complaint and Motion to Withdraw Complaint." Respondent's cross-motion is denied as lacking in merit.

In the underlying representation case, Respondent alleges four instances of the Board agent's bias or interference in the election process. First, the Board agent allegedly told the Petitioner's observer that there were several ways to prove challenges and he thought it would be easy for the Petitioner to prove most of its challenges. Second, the Board agent allegedly delayed opening the preelection conference by 15 minutes, awaiting the arrival of the Petitioner's representative, and then did not properly provide for the release of voters by acceding to the Petitioner's objection to the use of the public address system for such purpose. Third, the Board agent allegedly stopped informing

employees that the Petitioner challenged their vote after the Petitioner's observer remarked that employees appeared to be upset at being challenged. For the remaining election period the Board agent simply informed employees that their vote had been challenged. Fourth, the Board agent allegedly forced a unit employee to stand aside and wait during the polling period, thereby discouraging him from voting. Thus, when the employee appeared to vote, the Petitioner's observer said he was not sure whether the voter was in the unit and wanted to wait for the return of his fellow observer before challenging the voter. The Board agent asked the employee to wait and, after more than 10 minutes, the employee left without voting.

With respect to the first instance, the Regional Director found there was no evidence that the alleged statements were overheard by any employee other than the Employer's observer. He concluded that, assuming such statements occurred, they could not have had a material impact on the election. As to the second instance, the Regional Director found there was no evidence that the delay in opening the preelection conference prejudiced Respondent or that the method of releasing voters denied any employee the opportunity to vote. With regard to the third instance, the Regional Director found there was no evidence that the alleged challenge procedure used by the Board agent influenced the outcome of the election. Finally, the Regional Director found nothing improper in the Board agent's asking the voter to wait, as this was an attempt to avoid a challenge to the voter.

The Board subsequently affirmed the Regional Director's conclusions. We see nothing in Respondent's so-called newly discovered evidence which warrants a different result.

While we might question the former Board agent's judgment in accepting responsibility for the Union's efforts to secure recognition from Respondent, his employment with the Union in connection with this proceeding does not vitiate our earlier findings regarding his conduct during the election. We have carefully reexamined our previous findings and see no basis for altering them. Respondent's evidence does not now, in light of subsequent events, indicate any error in our previous decision detailed above.

As noted above, there was no evidence that the Board agent's conduct had a material impact on the election. Thus, for example, even assuming his comments to the Petitioner's observer about the ability to prove challenges showed bias, there is no evidence that they were overheard by any voters. That the former Board agent now, some 3 years after the election, works for the Union and against Respondent does not change this.

Nor do we find merit in Respondent's argument that the former Board agent's employment with the Union contravenes Section 102.119 of the Board's Rules and Regulations. That section prohibits practice before the Board of its agents in connection with any case or proceeding pending before the Board during the time of employment with the Board. While Respondent has offered evidence that the former Board agent is acting as the Union's business representative in its picketing of Respondent in connection with Respondent's refusal to bargain at issue herein, there is no evidence that he is representing the Union in any capacity before the Board in this proceeding. Accordingly, Respondent's cross-motion for withdrawal of order transferring the proceeding to the Board and Notice To Show

Cause is denied. All other matters raised in Respondent's answer to the complaint and response to the Notice To Show Cause were raised in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All material issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Sonoma Vineyards, Inc., a California corporation, has at all times material herein maintained an office and place of business in Windsor, California, where it has been and is engaged in the operation of a winery and in the sale of wine. During 1980, Respondent sold and shipped from that facility wine valued in excess of $50,000 directly to points outside California.

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[6]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On December 8, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 20, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 14, 1981, and the Union continues to be such exclusive respresentative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 3, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 18, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since September 18, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Sonoma Vineyards, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 14, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 18, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sonoma Vineyards, Inc., Windsor, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of

employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Windsor, California, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 30, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[7]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and re-

ceiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

SONOMA VINEYARDS, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 13018, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone (415) 556-0334.

Appendix C

United States of America
Before the National Labor Relations Board

Case 20-RC-14690

Sonoma Vineyards, Inc.
Employer

and

Distillery Workers Union
Local No. 186, AFL-CIO
Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION[1]

The National Labor Relations Board has considered determinative challenges in an election held December 8, 1978,[2] and the Hearing Officer's Report recommending disposition of same. The Board has reviewed the record[3] in light of the

[1]The instant decision supplements the Decision and Order Directing Hearing issued by the Board in this proceeding on July 11, 1979, (not contained in the Printed volumes of the Board's decision).

[2]The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The initial tally of ballots was 57 votes for, and 40 against, the Petitioner; there were 52 challenged ballots. A later corrected tally of ballots resulted in an increase in the number of challenges to 54.

[3]Pursuant to Section 102.133 of the Board's Rules and Regulations, Series 8, as amended, the letter dated May 5, 1981 from the Executive Secretary to William J. Fastiff, Esq. concerning an alleged *ex parte* communication to then Regional Director Allen from Petitioner's attorney, Victor Feingold, all the correspondence referred to therein, and the Employer's response to the alleged *ex parte* communication are made a part of the record in the instant proceeding.

Employer's exceptions[4] and briefs,[5] and the Petitioner's

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[4]In the absence of exceptions, we adopt, *pro forma*, the Hearing Officer's recommendation that the challenges to the ballots of Augustine Cruz, Malcolm D. McKenzie, Alicia Davis, John D. Peterson, Anita Stewart, Beverly Zarkey, and Adolfo Carrillo be overruled and that the challenge to the ballot of Wayne Toress be sustained.

Further, in view of our adoption of the Hearing Officer's recommendation to sustain the challenges to the ballots of 21 voters listed in Group A of his report, 12 voters listed in Group B, and to the ballots of G. Rener, C. Sandrin, L. S. Spector, R. L. Swiezey and W. Toress, we find it unnecessary to pass on the Hearing Officer's recommendation to sustain the challenges to the ballots of A. Bushman, D. Foote, A. McClain, F. P. Pacult, D. Burnett, E. Buzzi, R. Derrico, B. Rogers, and R. Tavares, as they cannot affect the results of the election. In addition, we shall not direct that the above seven overruled challenged ballots be opened and counted since they too cannot affect the results of the election. Accordingly, we shall issue a certification of representation.

[5]By letter dated September 12, 1980, addressed to then Regional Director Natalie Allen, the Union's attorney, Victor Feingold, made an inquiry concerning the delay in issuance of the Hearing Officer's report in the instant proceeding, and further stated that the Union's challenges to 52 ballots of employees in various job classifications appeared to be meritorious in view of the parties' stipulated unit description. This letter was not served upon the Employer. As the September 12th letter contained a communication to the Regional Director from the Union's attorney concerning the disposition on the merits of the substantial issues in this proceeding, and was not contemporaneously served on all the parties to the proceeding, it constitutes an *ex parte* communication within the meaning of Section 102.126 and 102.129 of the Board's Rules and Regulations, Series 8, as amended. The Employer has filed a brief, rebutting the statement made in the *ex parte* communciation, which as stated above, has been made part of the record in this proceeding. The Employer contends, *inter alia*, that the Board should either assess the record independent of the Hearing Officer's credibility resolutions and findings of fact, or remand the matter to a newly designated Hearing Officer, because the *ex parte* communication occurred prior to the issuance of the Hearing Officer's

opposition, and hereby adopts the [text omitted in original][6]

Report. We find no merit in this contention. The argument set forth in the Union's letter of September 12, merely reiterates the position taken by the Union at the hearing. The Employer, thus was afforded the opportunity to respond to this argument, and did in fact do so, prior to the issuance of the Hearing Officer's report. This fact is underscored by the Employer's submission, in rebutted to the Union's September 12 letter, of the brief it submitted to the Hearing Officer. While we do not condone the Union's unauthorized communication, we find that it in no way prejudiced the Employer. Accordingly, we deny the Employer's requests for a hearing *de novo* or an independent assessment by the Board of the record herein.

[6]We adopt the Hearing Officer's recommendation that the Petitioner's challenge to the ballots of employees listed in the Hearing Officer's Report in Group A and Group B be sustained on the ground that they are office clerical employees for the following reasons. We find these employees are clericals because as found by Hearing Officer their duties are clerical in nature and the skills they employ are different from production employees. Further, we find they are office clericals on the basis of factors relied upon by the Hearing Officer including their separate rest room and time clocks; their work location in the same area as, and their primary contact with, undisputed office clerical employees their separate supervision from unit employees, including shipping and other unit employees; their performance of no job functions which are essentially integrated with the work of unit employees, and their infrequent contacts, and minimal interchange with unit employees. In the case of employees in Group B, we also rely, as did the Hearing Officer, on their salaried status which contrasts with that of unit employees who are hourly paid.

As to the order processing employees in Group A above, we note that the Employer's contention that the stipulation required their inclusion, raises nothing not previously considered and rejected by the Board in its Decision and Direction of Hearing.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots has been cast for Distillery Workers Union, Local No. 186, AFL-CIO, and that pursuant to Section 9(a) of the Act, the foregoing Labor Organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees of the Employer at its Windsor, California, facilities including, cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; and excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., July 14, 1981.

_____

John H. Fanning, Chairman

_____

Howard Jenkins, Jr., Member

_____

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix D

United States of America
Before The National Labor Relations Board

Case 20-RC-14690

Sonoma Vineyards, Inc.
Employer

and

Distillery Workers Union,
Local No. 186, AFL-CIO
Petitioner

DECISION AND ORDER DIRECTING HEARING

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered challenged ballots and objections to an election[1] held on December 8, 1978, and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief and

[1]The election was pursuant to a Stipulation for Certification Upon Consent Election approved October 6, 1978. The appropriate unit is:

All production and maintenance employees employed by the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act.

The tally was 57 for, and 40 against, the Petitioner, there were 54 challenged ballots which are determinative of the results of the election.

hereby adopts the Regional Director's findings and recommendations.[2]

It Is Hereby Ordered that a hearing be held before a Hearing Officer designated by the Regional Director for the purpose of receiving evidence to resolve the challenged ballots herein.

It Is Further Ordered that the Hearing Officer, designated for the purpose of conducting such hearing, shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said challenges. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

It Is Further Ordered that the above-entitled proceeding be, and it hereby is, remanded to the Regional Director for Region 20 for the purposes of arranging such hearing, and

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[2]Insofar as the Employer's objections involve alleged misrepresentations. Members Jenkins and Truesdale affirm the Regional Director for reasons set forth in *General Knit of California, Inc.*, 239 NLRB No. 101 (1978). Member Murphy agrees for the reasons set forth in her concurring opinion in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977). See her dissent in *General Knit*.

that the said Regional Director be, and she hereby is, authorized to issue notice thereof.

Dated, Washington, D.C., July 11, 1979.

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

Appendix B

United States of America
Before The National Labor Relations Board[1]

Case No. 20-RC-14690

Sonoma Vineyards, Inc.
Employer

and

Distillery Workers Union,
Local 186, AFL-CIO
Petitioner

REPORT ON CHALLENGED BALLOTS AND OBJECTIONS; ORDER AND NOTICE OF HEARING

Pursuant to a Stipulation For Certification Upon Consent Election approved October 6, 1978,[2] an election by secret ballot was conducted on December 8, in a unit of all production and maintenance employees of the Employer at its Windsor, California facilities, including cellar employees, tasting room employees, maintenance and repair employees, mail order processing employees, labeling employees, shipping and receiving employees; excluding catering employees, office clerical employees, guards and supervisors as defined in the Act. The official Tally of Ballots served upon the parties at the conclusion of the election showed that of approximately 173 eligible voters, 57 cast ballots for Petitioner, 40 cast ballots against Petitioner and 54

[1]Herein called the Board.

[2]All dates hereafter refer to calendar year 1978, unless otherwise noted.

ballots were challenged. The 54 challenged ballots are determinative of the results of the election.

On December 15, the Employer filed timely objections to the election, a copy of which was duly served on Petitioner.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the challenges and objections to be made and reports as follows:

The Objections:

The Employer's objections state:

1. Winery, Distillery and Allied Workers Union, Local No. 186, AFL-CIO (hereinafter referred to as "the Union"), but [sic] its agents, supporters, members, representatives and sympathizers, made material misrepresentations of fact to the employees at a time which did not permit a response from the Employer.

2. The Union, by its agents and supporters, made material misrepresentations of law to the employees at a time which did not permit a response from the Employer.

3. The Union, by its agents and supporters, threatened, coerced and intimidated some employees to cause them to vote for the Union.

4. The Union, by its agents and supporters, threatened, coerced and intimidated other employees in order to prevent them from voting.

5. The Union, by its agents and supporters, made categorical promises of benefits to the employees if they would vote for the Union.

6. The Union, but its agents and supporters, unlawfully and improperly offered to waive Union initiation fees.

7. The Union, by its agents and supporters, unlawfully and improperly interrogated employees regarding their election preferences.

8. The Union, by its agents and supporters, made material misrepresentations to employees about existing union contracts, their contents, and benefits thereunder.

9. An "atmosphere of fear" was created among the employees prior to the election, by the Union and its agents and supporters.

10. The Union, by its agents and supporters, painted a false picture of Union support prior to the election.

11. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process, destroyed the necessary laboratory conditions, demonstrated bias and prejudice against the Employer and favoritism toward the Union by the Board Agent's actions and conversations prior to, during, and after the election.

12. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by scheduling the pre-election conference at a time which prevented agreement upon an orderly procedure for the release of voters.

13. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by scheduling the pre-election conference at a time which prevented agreement upon an orderly method for informing voters of the precise location of the polling.

14. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by utilizing a procedure for the release of voters which caused great congestion and confusion.

15. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by failing to take corrective action once it became clear that the method being utilized for the release of voters was causing great congestion and confusion.

16. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by failing to make certain that employees were informed of the precise location of the polling.

17. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by informing challenged voters of the fact that their eligibility was being challenged in a manner which expressed bias and prejudice against the Employer and favoritism toward the Union.

18. The National Labor Relations Board, through its Board Agent, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by disenfranchising an eligible employee through forcing that employee to stand to the side of the voting line in excess of 10 minutes without any proper reason or justification, thereby intimidating and discouraging that employee from voting.

19. The National Labor Relations Board interfered with the fair operation of the election process and destroyed the necessary laboratory conditions by requiring both the Employer's observers and the Union's observers to wear badges throughout the election which displayed a union emblem, thereby demonstrating bias and prejudice against the Employer and favoritism toward the Union.

By the conduct described above, and by other unlawful conduct, the Union, its agents, representatives and supporters, third parties, and the Board Agent, destroyed the necessary laboratory conditions, and interfered with the holding of a free and fair election among the Employer's employees at the election conducted on December 8, 1978 and substantially and materially affected the outcome of said election.

Objections Nos. 1, 2, 8 and 10:

These objections are based on alleged misrepresentations of fact and law by Petitioner. In support thereof, the Employer submitted the declaration of one employee who states that she attended the last meeting conducted by Petitioner before the election. It appears this meeting took place on December 6. At the meeting a question was raised whether the Employer could afford to increase wages if Petitioner was certified. According to the employee, Petitioner's business agent Ben Koch said that 35% of the Employer's employees were salaried management-type employees whereas most wineries had only about 5% in this category. Further, Koch "indicated" that there must be "some fat at the top," and said that as the Employer was paying off loans at the rate of $3 million a year, surely some of this money could go to employees. The Employer asserts that only 23% of its employees are salaried and

that since its reorganization in 1976, it has not been able to pay off the principal of any loans, has increased its indebtedness, and has had to arrange to defer some scheduled interest payments.

The Board in *Hollywood Ceramics, Inc.*, 140 NLRB No. 221, set forth three primary tests to be used to determine if misrepresentations can reasonably be expected to have a significant effect on an election. The Board held that unless all the tests are met in the affirmative an election will not be set aside notwithstanding the misrepresentations. In applying these tests it is apparent that the alleged misrepresentations, if made, must have concerned some material issue in the election. There is no evidence that the number of salaried or managerial employees was an issue in the election. However, the investigation disclosed that even prior to the filing of the petition an employee had written to the Union questioning whether the Employer would be able to afford pay increases if Petitioner was successful. Also, the investigation disclosed that on November 6 Petitioner mailed a letter to all employees. This letter states in part:

> A big concern on everyone's mind is whether or not a decent wage and benefit plan would bankrupt the company. It is obvious that it would not be in our best interest to shut down the winery. The Union is only concerned with our best interests and will ask for no more than the company can afford to pay.
>
> In 1975 there was a reorganization of the company. At this time the company borrowed a huge sum of money to finance new buildings, tanks and equipment. The company has been able to pay back over one mil-

> lion dollars a year. This shows that the company has been successful and can afford to pay us a better wage than we are now getting. So don't let them try to fool you into thinking that a Union would financially destroy the company.

The second test is whether the misrepresentations are a substantial departure from the truth. With respect to the alleged million or three million dollar a year repayment of bank loans it must be concluded that this is a substantial departure from the truth as there has been no repayment. The third test is whether the misrepresentations were made at a time which prevents the other party from making an effective reply. The Employer has not asserted or contended that it was unaware of the alleged misrepresentation concerning the bank payments nor has it contended that it did not respond to these misrepresentations. From this plus the widespread distribution of Petitioner's November 6 letter, it is concluded that the Employer had knowledge of the alleged misrepresentations in time to have permitted an effective reply. In fact, in a letter sent to the employees on November 17, the Employer stated ". . . it is noteworthy that this company has been able to do as much as it has for employees in the face of 'continuing' financial disaster." The letter also refers to the company's "bleak financial outlook."

In considering the alleged misrepresentations concerning the number of salaried and managerial employees it must be noted that the employees possessed independent knowledge with which to evaluate the statements and therefore it is not reasonable to conclude that these statements had a significant impact on the election. With respect to the mis-

representations concerning the loan payments, it is also noted that Petitioner did not indicate in making the statements that it had some special knowledge that would have given the statements such a ring of authority, that employees would be likely to accept them as true, despite the Employer's contention that it was facing financial disaster.

On the basis of the above, it is concluded that these objections are without merit. It is therefore recommended that Objections Nos. 1, 2, 8 and 10 be overruled.

Objections Nos. 3, 4, and 9:

These objections are based on alleged threats, intimidation and coercion by Petitioner and the alleged creation of an "atmosphere of fear" among employees. In support of these objections, the Employer submitted a declaration by a supervisor, stating that he had been told by an unnamed employee that another unnamed employee, who was a Union supporter, had suggested at a Union meeting that the Border Patrol be called (presumably to investigate the possibility that illegal aliens were among the work force). The statement also asserts that the Employer had several Spanish speaking employees of Mexican descent who were "very upset by these rumors." The Employer submitted no evidence establishing the number of employees who were exposed to the rumor nor any evidence to substantiate the conclusionary assertion that the Spanish speaking employees were "very upset" by the rumor. Neither does it appear that a report was actually made to the Border Patrol concerning this matter. In light of these circumstances and especially in light of the fact that there is no evidence attributing this conduct to Petitioner, it cannot be concluded that the conduct, if it occurred, had a substantial effect on the

election, and it is, therefore, recommended that Objections 3, 4 and 9 be overruled.

Objections Nos. 5, 6 and 7:

The Employer submitted no evidence in support of these objections. It is therefore recommended that they be overruled.

Objection No. 19:

This objection is based on the allegation that the badges provided by the Board and worn by the observers during the election contained a Union emblem or "bug", thus showing favoritism toward the Union. In support of this objection the Employer submitted a declaration of an employee, who was also the Employer's election observer. The employee states that she happened to look at the bottom of the badge given to her by the Board Agent and noticed that it bore an insignia stating it was union made, and the initials and local number of a union. The employee goes on to state: "I was quite startled to see this because I had previously thought that the National Labor Relations Board was supposed to be an unbiased agency." She also states that she, "did not understand how the Board could express support for a union on buttons displayed at an election if it was supposed to be an unbiased agency."

The observer's badge used by the agency is circular, with a diameter of 2-7/16 inches. The edge of the badge is between 1/16 and 1/8 of an inch thick. On the face of the badge, around the upper perimeter are the words: "National Labor Relations Board." Also on the face of the badge are the words: "Election Observer." Between these words is a slot in which the name of the Employer or Petitioner is

inserted. On the bottom edge of the badge, printed in very small letters, is the name of the firm that manufactured the badges, a union "bug" and the logo of a union and local union number. The purpose of the badges is to designate to the voters that the persons wearing them are official observers in the election. The badges as worn, are visible to any voter who approaches the observers' stations at the election. However, the bottom edge of the badge is not visible when the badge is viewed full face. It would be difficult, if not impossible, for a voter to view the bottom edge of the badge, unless the voter lifted the badge up to look at its edge. There is no evidence that a voter, other than the Employer's observer, was aware of the printing on the edge of the badge. In any event, assuming that the minuscule union bug and logo could be viewed by voters, the use of these official NLRB badges is a long-established and approved practice. An objection based upon the fact that they were printed in a union shop does not warrant consideration. It is therefore recommended that Objection No. 19 be overruled.

Objection No. 11:

This objection is based on the Board Agent's conversations with Petitioner's observer during the course of the election. In support of this objection the Employer's observer states that during the morning voting session, Petitioner's observer, after challenging a substantial number of voters, asked the Board Agent what would happen to the challenges. The Board Agent assertedly answered that there were "several ways to prove the challenges," and Petitioner could use any one of these ways to "prove" them. The Board Agent allegedly further said that he

thought it would be very easy for Petitioner to "prove" most of its challenges. There is no evidence the alleged statements were overheard by any employee other than the Employer's observer. Assuming that the conversation took place as alleged, there does not appear to be a basis to conclude that such statements overheard by a single voter could have had a material impact on the election. It is therefore recommended that Objection No. 11 be overruled.

Objections Nos. 12, 13, 14, 15 and 16:

These objections are based on allegations that the Board Agent did not properly schedule the pre-election conference and did not properly provide for the release of voters. In support thereof, the Employer's observer states that although the pre-election conference was scheduled for 9:00 a.m., Petitioner did not make an appearance until 9:15 a.m. Petitioner then discussed the eligibility of 67 names on the eligibility list and, not being able to reach agreement with the Employer as to their eligibility, stated it intended to challenge these voters. This discussion lasted until 9:50 a.m., ten minutes before the polls were scheduled to open. The Employer then suggested using the public address system to notify the employees of the location of the polling place as the exact place was not specified in the Notice of Election. Petitioner objected to the use of the public address system and the Board Agent said it would not be used. It was agreed, upon the Employer's suggestion, that both parties would select additional observers who would advise the employees of the location of the polling place. After the polls opened, large groups of voters began to enter the polling area, which made it difficult to

hear the Board Agent's instructions. It is also asserted that the large number of voters made it difficult to keep track of who had voted and who had not.

There is no evidence that any employee was denied an opportunity to vote, nor is there any evidence of irregularities in the voting. Further it does not appear that delay in opening the pre-election conference resulted in any prejudice to the Employer. It is therefore concluded that the evidence does not establish that the matters complained of prevented a fair election, and it is recommended that Objections Nos. 12, 13, 14, 15 and 16 be overruled.

Objection No. 17:

The Employer's observer states that during the morning voting session "nearly every time" one of Petitioner's observers challenged a voter, the Board Agent informed the voter that Petitioner was challenging his or her eligibility and then provided the voter with a challenged ballot envelope, as well as instructions in the use of that envelope. The employee also states that "nearly each time" the Board Agent told a voter that Petitioner was making the challenge, the voter became visibly indignant or upset. The employee then states that after this happened numerous times the two Union observers commented that they were very upset at the negative reaction to their challenges. The employee goes on to state that throughout the afternoon voting session, the Board Agent simply informed employees that their votes were being challenged, and did not, as he had in the morning session, state that Petitioner was making the challenge. No other evidence was submitted by the Employer to substantiate this objection.

Petitioner's observers state that at all times during the election after a voter was challenged the Board Agent would ask the observer the reason for the challenge and, after the observer gave the reason, would take a challenged ballot envelope, write in the name of the challenged voter and the reason for the challenge, and explain to the voter who made the challenge the reason for the challenge and how the secrecy of the ballot would be maintained.

Assuming that during the afternoon polling session, the Board Agent ceased announcing himself that Petitioner was challenging a voter, the omission does not demonstrate bias or prejudice against the Employer and favoritism toward Petitioner. Obviously, the voter would know that he was challenged by Petitioner when the Petitioner's observer announced the challenge. Furthermore, there is no evidence to show that the alleged challenge procedure used by the Board Agent influenced the outcome of the election in any way. Accordingly, it is recommended that Objection No. 17 be overruled.

Objection No. 18:

This objection alleges that the Board Agent forced a unit employee to stand aside and wait during the polling period, thereby intimidating the employee and discouraging him from voting. In support of this objection, the Employer's election observer states that during a period of time when the voting place was very busy, an employee named Frank Carrillo appeared to vote. Petitioner's observer challenged Carrillo. The Employer's observer stated that she knew Carrillo to be an employee in the tasting room. The Union's observer then said he was not sure and said he wanted to

wait until the return of his fellow observer, who was then announcing the location of voting to other employees. The Board Agent then asked Carrillo to stand aside and wait. Finally after more than ten minutes of waiting, Carrillo walked out of the polling area without voting.

Carrillo, who appeared to vote during the morning session, works part-time in the tasting room of the Windsor Winery. On the day of the election he worked from 8:00 a.m. to 5:00 p.m. The polls were open from 10:00 a.m. until 11:30 a.m. and from 3:15 p.m. until 4:45 p.m. The Board Agent asked Carrillo to wait, based on his expectation that the challenge might be resolved by the return of the other Union observer. Carrillo left without advising the Board Agent that he was leaving, without asking for a ballot and without expressing to the Board Agent any reason for leaving. Carrillo had an opportunity to vote later. Under the circumstances, with many challenges being made and many voters coming in at the same time, it was not unreasonable for the Board Agent to ask an employee to wait in the hope that a potential challenge could be resolved. By doing this the Board Agent did not intimidate or coerce the employee nor did he deny the employee an opportunity to cast a ballot. It is therefore recommended that Objection No. 18 be overruled.

In summary, it is recommended that the objections be overruled in their entirety.

The Challenges:

The following employees were challenged by Petitioner on the asserted ground that these employees are office clerical employees. The Employer contends that they are mail order processing employees, a classification included in the unit.

M. Barnes	M. Grantham	M. Michaelson
J. Beck	C. Hernandez	L. Pendergraft
M. Binkley	L. Lamb	W. Ring
C. Bundesen	M. Lampson	M. Schouweiler
K. Culver	S. L. McCowan	L. Sherman
P. Ferronato	M. McDonald	J. Wilson
N. Garfagnoli	M. Medeiros	J. Woolman

The eligibility of the above-listed employees is an issue which grows out of a dispute between the parties as to the meaning of the unit description in the election agreement. In the course of arranging for the election agreement the parties met outside the presence of a Board Agent and negotiated the language of the unit description and other matters encompassed by the election agreement. The Petitioner contends that at this meeting it was expressly agreed that the classification mail order processing employees as used in the election agreement would not include the above-listed employees who work in the Employer's upstairs office area. The Employer denies that any such understanding was reached and contends that these employees are clearly encompassed by the unit description. As it is not possible to establish with clarity the intent of the parties in describing the appropriate unit, it becomes necessary to determine whether under applicable Board law this group of employees is appropriately included in the bargaining unit. Essentially the issue appears to be a question of fact as to whether these employees have separate interests which would war-

rant separating them from the other employees covered by the unit description. It is concluded that this issue can best be resolved by a hearing.

The following voters were challenged by Petitioner on the asserted basis that they are supervisors and hence not eligible to vote. The Employer contends to the contrary. As there are material issues of fact, the eligibility of these voters can best be determined by a hearing.

A. Bushman
A. Cruz
D. Foote
A. McClain
F. P. Pacult

The following employees were challenged by Petitioner on the asserted basis that they are employed at the Employer's Tiburon and San Francisco locations. The Employer contends that these employees work at the Windsor location. As there are material issues of fact, the eligibility of these voters can best be determined by a hearing.

M. D. McKenzie
G. Remer
C. Sandin
L. A. Spector
R. L. Sweezey

Petitioner challenged the ballots of the following employees on the asserted basis that they are office clerical employees. The Employer contends that they are eligible unit employees. As there are material issues of fact, the eligibility of these employees can best be determined by a hearing.

D. S. Pratt
B. Puentes
W. Putnam
P. Speicher

The following employees' ballots were challenged by Petitioner for the reasons listed below. The Employer contends that they are eligible unit employees.

J. Boyce	—Not in unit, office clerical, secretary
E. Buzzi	—Not in unit, agriculture employee
D. Burnett	—Not in unit
G. Campbell	—Not in unit, office clerical
F. Carpenter	—Not in unit, office clerical
A. Davis	—Not in unit, office clerical
R. Derrico	—Not in unit, agriculture employee
D. Griffin	—Not in unit, office clerical
P. McCoy	—Not in unit, office clerical
A. Miller	—Not in unit, office clerical, secretary
J. D. Peterson	—Not in unit, lab technician
B. Rodgers	—Not in unit, agriculture maintenance employee
S. Shirrel	—Not in unit, office clerical
R. Skiman	—Not in unit, office clerical
A. Stewart	—Not in unit
R. Tavares	—Not in unit, agriculture maintenance employee
B. Zarky	—Not in unit

As there are material issues of fact, the eligibility of these employees can best be determined at a hearing.

The ballots of *Wayne Torres* and *Adolfo Carrillo* were challenged by the Board Agent because their names did not appear on the eligibility list. The Employer states that Torres' name was omitted because he had been terminated prior to the eligibility date. The Petitioner asserts that Torres was informed by the Employer that he was on layoff subject to recall. With respect to Carrillo, the dispute apparently involves confusion of names and identities. The Employer supplied evidence that Carrillo is the same person listed on the eligibility list as A. C. Maldonado. The disparity in names apparently resulted from the Hispanic use of maternal family names in lieu of fraternal family names. The Petitioner takes no position as to this issue and has

presented no evidence to refute that supplied by the Employer.

In view of the facts set forth above, it is concluded that substantial and material issues of fact exist as to the eligibility of Wayne Torres which can best be determined by a hearing. However, with respect to Adolfo Carrillo (Maldonado) it appears that there is no substantial issue of fact and that he is an eligible voter. It is, therefore, recommended that the challenge to his ballot be overruled. It is further recommended that his ballot not be opened and counted pending ruling on the remaining challenges.

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended,

It Is Hereby Ordered that a hearing be held to resolve the eligibility of the aforesaid 53 challenged voters before a duly designated Hearing Officer, at a date, time and place hereafter to be announced, at which time and place the parties will have the right to appear in person, or otherwise, and give testimony in support of or in opposition to the aforesaid matters and to examine and cross-examine witnesses with respect thereto.

It Is Further Ordered that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of these matters. Within 10 days from the issuance of such report, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto, together with a copy of any brief filed, on the other party, and shall file a copy with the undersigned. If no exceptions are filed, the Board may

decide the matter forthwith upon the record or may make other disposition of the case.

Dated At San Francisco, California, this 13th day of March, 1979.[3]

Natalie P. Allen,
Regional Director
National Labor Relations Board
Region 20
450 Golden Gate Ave., Box 36047
San Francisco, California 94102

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[3]Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. Pursuant to Section 102.69(g), affidavits and other documents which a party has timely submitted to the Regional Director in support of objections are not a part of the record unless included in the Regional Director's Report, or appended to the exceptions or opposition thereto which a party submits to the Board. Exceptions must be received by the Board in Washington, D.C. by March 26, 1979.

Appendix F

No. 83-7025

United States Court of Appeals
For The Ninth Circuit

National Labor Relations Board,
Petitioner,

v.

Sonoma Vineyards, Inc.,
Respondent.

[Filed May 3, 1984]

ORDER

Before: WALLACE and BOOCHEVER, Circuit Judges, and WYZANSKI, Senior District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

*Honorable Charles E. Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

Appendix G

DECLARATION OF WILLIAM BAGGE

I, William Bagge, hereby depose and state:

I am presently employed as a supervisor at Sonoma Vineyards in the Cellar. The Winery employs several Spanish-speaking employees of Mexican descent in the Cellar. Shortly before the National Labor Relations Board election conducted at the Winery on December 9, 1978, I heard from a few of these employees that another individual working in the Cellar who had been a vocal advocate of the Union, had called the Border Patrol in hopes of having them removed before the election. They said they heard this from someone on the Bottling Line who was present when the individual involved suggested calling the Border Patrol at a Union meeting. All of the Spanish-speaking employees in the Cellar were very upset by these rumors. I don't know if these rumors kept any of them from voting or not. I have read this declaration and declare under penalty of perjury that it is true and correct. Executed this 20th day of December, 1978 in Windsor, Ca.

William Bagge